Khoo Cheng & Ors (as Administrators of the Estate of Gan Hong Kok, deceased) v Gan Hong Yock & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO J–02–485 OF 1998 AND J–02–627 OF 1998
ABDUL KADIR SULAIMAN, ARIFIN JAKA AND NIK HASHIM JJCA
24 FEBRUARY 2004

Civil Procedure — Service — Originating summons — Failure to serve originating summons for order of distribution and administrators' failure to serve application for order of sale and notice of hearing — Whether violation of rules of natural justice — Whether order granted must be set aside ex debito justitiae

Succession — Distribution of estate — Intestacy — Sale of land — Application of best price rule — Sale of land many times lower than valuers' price, whether justifiable — Duty to sell land not lower than the reserved price

The deceased died intestate on 26 November 1972 leaving behind valuable immovable property ('the property'). He was survived by his wife (the first appellant) and their 15 children. Letters of administration of the estate of the deceased were granted to the first appellant and their sons, the second and third appellants ('the administrators'). There were two appeals in this case — Civil Appeal No J–02–485 of 1998 ('Appeal 485') and Civil Appeal No J–02–627 of 1998 ('Appeal 627'). All the appellants and respondents of the appeals were beneficiaries of the estate.

The respondents in the two appeals had through originating summons No 852 of 1992 ('OS 852') sought an order for the distribution of the property. In OS 852, the five respondents cited eleven defendants, ie their mother (the first appellant) and the other siblings. The administrators had made an application ('the administrators' application') in OS 852 for an order of sale of the 40 lots of land of the deceased's estate at the stated reserved prices based on the valuation reports of their valuers. The administrators' application was heard by the learned judge on 16 June 1998 when he made his order ('the order of 16 June 1998') appealed against in Appeal 485. The fourth, fifth and sixth appellants in Appeal 485 were three of the eleven defendants in OS 852 and had applied to intervene and were so added as parties as the fourth to sixth appellants in Appeal 485.

The fourth to sixth appellants' complaints were three fold. First, that they were not served with OS 852 as well as the administrators' application for an order of sale of the 40 lots of land belonging to the estate of the deceased. Secondly, the fourth to sixth appellants complained that the learned judge did not observe the best price available and that he had favoured the five respondents and sold the 13 selected lots of land to them at prices incredibly lower than their own

valuations or those of the administrators. Thirdly, the fourth to sixth appellants complained that in the administrators' application, the administrators had applied to court for only an *order of sale* of the 40 lots of land at the stated reserved prices. The administrators had *not* applied for any lot of land to be sold to the five respondents or anyone. On this point, counsel for all the appellants complained that what the learned judge did was in effect to sell the 13 selected lots of land to the five respondents with preferential treatment.

Appeal 627 was an appeal by the administrators against the refusal of the learned judge to amend the relevant reserved prices in the administrators' application as there were some obvious typing errors for the reserved prices which were based on the valuation reports of the administrators.

Held, allowing both appeals with costs:

(1) The respondents' failure to serve OS 852 for an order of distribution and the administrators' failure to serve their application for order of sale and notice of hearing fixed on 16 June 1998 on the fourth to sixth appellants constituted a clear violation of the rules of natural justice. On this ground alone, the fourth to sixth appellants were entitled to have the impunged order of 16 June 1998 set aside *ex debito justitiae* (see para 7).

(2) The learned judge, assuming he had a proper application for sale before him, should have applied the best price rule and sold the 13 lots of land at the best prices available. The ultimate object of the best price rule is the protection of the interest of all the beneficiaries of the estate as a whole, not merely the interests of some of the beneficiaries. In the circumstances, the learned judge should have acted on the valuation reports of the administrators, and the Lot 2083 should therefore be sold at the minimum price of RM400,000, instead of RM52,560. He had erred in law by selling it at a wholly unjustifiable price many times lower than that minimum price (see para 11).

(3) The learned judge was not at liberty to go beyond the scope of the administrators' application before him for his decision. The learned judge erred in law in making the order of sale of 16 June 1998, which must be set aside. He should have given due regards to the interests of all the beneficiaries, not just a fraction of them. If a property is sold below the reserved price based on a proper valuation report, each beneficiary will receive less money on distribution by the administrators. Once the order of sale is made under s 60(4) of the Probate and Administration Act 1959, it is the duty of the administrators to sell the estate property at a price not lower than the reserved price. The administrators should act in the best interest of the estate and sell it at the highest price that is available (see para 13).

(4) Counsel for the respondents had objected to the amendment solely because it was made orally and not in writing, although he had been notified in a letter on the proposed amendment. The objection of the respondents was without any merit and that the learned judge should have allowed the amendment to reflect the proper reserved prices based on the evidence of the administrators' valuation reports which were before him (see para 15).

[**Bahasa Malaysia summary**

Si mati telah meninggal dunia tanpa wasiat pada 26 November 1972 meninggalkan hartanah tak alih yang berharga ('hartanah tersebut'). Beliau meninggalkan seorang isteri (perayu pertama) dan 15 orang anak. Surat-surat pentadbiran harta pusaka si mati diberikan kepada perayu pertama dan anak-anak lelaki mereka, perayu-perayu kedua dan ketiga ('pentadbir harta pusaka'). Terdapat dua rayuan dalam kes ini — Rayuan Sivil No J-02-485 tahun 1998 ('Rayuan 485') dan Rayuan Sivil No J–02–627 tahun 1998 ('Rayuan 627'). Kesemua perayu dan responden kepada rayuan-rayuan tersebut merupakan benefisiari harta pusaka tersebut.

Responden-responden dalam dua rayuan tersebut telah melalui saman pemula No 852 tahun 1992 ('SP 852') memohon satu perintah untuk pengagihan hartanah tersebut. Dalam SP 852, kelima-lima responden telah menamakan sebelas defendan, iaitu ibu mereka (perayu pertama) dan adik-beradik lain. Pentadbir harta pusaka tersebut telah membuat satu permohonan ('permohonan pentadbir tersebut') dalam SP 852 untuk satu perintah jualan 40 lot tanah harta pusaka si mati pada harga rizab yang dinyatakan berdasarkan laporan penilaian harga jurunilai. Permohonan pentadbir harta pusaka didengar oleh hakim yang bijaksana pada 16 Jun 1998 apabila beliau membuat perintah beliau ('perintah 16 Jun 1998') yang dirayu dalam Rayuan 485. Perayu-perayu keempat, kelima dan keenam dalam Rayuan 485 merupakan tiga daripada sebelas defendan-defendan dalam SP 852 dan telah memohon untuk campur tangan dan dimasukkan sebagai pihak sebagai perayu-perayu keempat hingga keenam dalam Rayuan 485.

Aduan perayu-perayu keempat hingga keenam terbahagi kepada tiga. Pertama, bahawa mereka tidak disampaikan dengan SP 852 juga permohonan pentadbir harta pusaka untuk satu perintah jualan 40 lot tanah milik harta pusaka si mati. Kedua, perayu-perayu keempat hingga keenam mengadu bahawa hakim yang bijaksana tidak meneliti harga terbaik yang ada dan bahawa beliau menyebelahi kelima-lima responden dan menjual 13 lot tanah yang dipilih kepada mereka pada harga yang terlalu rendah daripada penilaian mereka sendiri atau oleh pentadbir harta pusaka. Ketiga, perayu-perayu keempat hingga keenam mengadu bahawa dalam permohonan pentadbir harta pusaka, pentadbir harta pusaka telah memohon kepada mahkamah hanya untuk satu *perintah jualan* 40 lot tanah pada harga rizab yang dinyatakan. Pentadbir harta pusaka *tidak* memohon

untuk mana-mana lot tanah tersebut dijual kepada kelima-lima responden atau sesiapapun. Sehubungan itu, peguam bagi pihak kesemua perayu mengadu bahawa apa yang dilakukan oleh hakim yang bijaksana adalah menjual 13 lot tanah yang dipilih kepada kelima-lima responden dengan layanan pilih kasih.

Rayuan 627 adalah rayuan oleh pentadbir harta pusaka terhadap keengganan hakim yang bijaksana untuk meminda harga rizab yang relevan dalam permohonan pentadbir harta pusaka kerana terdapat kesilapan penaipan yang nyata untuk harga rizab yang berdasarkan laporan-laporan penilaian pentadbir harta pusaka tersebut.

Diputuskan, membenarkan kedua-dua rayuan dengan kos:

(1) Kegagalan pihak responden untuk menyampaikan SP 852 untuk satu perintah pengagihan dan kegagalan pentadbir harta pusaka untuk menyampaikan permohonan mereka untuk perintah jualan dan notis perbicaraan yang ditetapkan pada 16 Jun 1998 ke atas perayu-perayu keempat hingga keenam membentuk perlanggaran nyata rukun keadilan semulajadi. Berdasarkan alasan ini semata-mata, perayu-perayu keempat hingga keenam berhak untuk mengetepikan *ex debito justitiae* perintah 16 Jun 1998 yang dipersoalkan (lihat perenggan 7).

(2) Hakim yang bijaksana, dengan andaian beliau mempunyai permohonan untuk jualan yang betul di hadapannya, sepatutnya menggunakan rukun harga terbaik dan menjual 13 lot tanah tersebut pada harga terbaik yang ada. Objektif utama rukun harga terbaik adalah untuk melindungi kepentingan kesemua benefisiari harta pusaka secara keseluruhan, dan bukan hanya kepentingan beberapa benefisiari sahaja. Dalam keadaan sedemikian, hakim yang bijaksana sepatutnya bertindak berdasarkan laporan-laporan penilaian pentadbir harta pusaka, dan Lot 2083 sepatutnya dijual pada harga minimum berjumlah RM400,000, dan bukan RM52,560. Beliau telah terkhilaf dari segi undang-undang dengan menjual pada harga yang tidak dijustifikasikan langsung yang terlalu rendah daripada harga minimum (lihat perenggan 11).

(3) Hakim yang bijaksana tidak mempunyai kebebasan untuk bertindak melampaui skop permohonan pentadbir harta pusaka di hadapan beliau dalam membuat keputusan. Hakim yang bijaksana terkhilaf dari segi undang-undang semasa membuat perintah jualan 16 Jun 1998, yang perlu diketepikan. Beliau sepatutnya mempertimbangkan kepentingan kesemua benefisiari, dan bukan sebahagian daripada mereka. Jika sekeping hartanah dijual di bawah harga rizab berdasarkan laporan penilaian, setiap daripada benefisiari akan menerima wang yang kurang semasa pengagihan oleh pentadbir harta pusaka. Setelah perintah jualan dibuat di bawah s 60(4) Akta Probet dan Pentadbiran 1959, adalah tanggungjawab pentadbir harta pusaka untuk menjual hartanah harta pusaka tersebut pada harga tidak kurang daripada harga rizab. Pentadbir harta pusaka tersebut sepatutnya

bertindak demi kepentingan harta pusaka tersebut dan menjualnya pada harga tertinggi yang ada (lihat perenggan 13).

(4) Peguam bagi pihak responden membantah kepada pindaan tersebut semata-mata kerana ia dibuat secara lisan dan bukan secara bertulis, meskipun beliau telah dimaklumkan dalam surat tentang cadangan pindaan itu. Bantahan responden adalah tanpa merit dan hakim yang bijaksana sepatutnya membenarkan pindaan itu untuk menggambarkan harga rizab yang betul berdasarkan keterangan laporan penilaian pentadbir harta pusaka di hadapan beliau (lihat perenggan 15).]

Notes

For cases on service of originating summons, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5268–5269.
For cases on intestacy, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) 2153–2165.

Cases referred to

Buttle v Sounders [1950] 2 All ER 193 (refd)
Che Ah and Che Yang Kelsom v Che Ahmad [1941] MLJ 126 (refd)
Dawson (Deceased), Re [1959] NZLR 1360 (refd)
JP Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134 (refd)
Muniandy a/l Thamba Kaundan & Anor v D & C Bank & Anor [1996] 1 MLJ 374 (refd)
Ng Lit Cheng v Felixia Varnakulasinghe & Anor [1977] 2 MLJ 249 (refd)
R v Appeal Committee of County of London Quarter Sessions [1956] 1 All ER 670 (refd)
Tunku Mohamed Jewa Ibni Almarhum Sultan Abdul Hamid, Deceased, Re the Estate of, Tunku Ismail bin Tunku Mohamed Jewa & Anor v Tunku Baharom Bin Tunku Mohamed Jewa & Ors [1982] 2 MLJ 44 (refd)
White v Winston [1965] 2 QB 647 (refd)

Legislation referred to

Distribution Act 1958 s 6(1)(e)
Probate and Administration Act 1959 s 60(4)
Trustee Act 1949 s 59
Trustee Act 1956 [NZ] s 64

Appeal from: Originating Summons No 852 of 1992 (High Court, Johor Bahru)

Dominic Puthucheary (Firoz Hussein Ahmad Jamaluddin with him) (Puthucheary Firoz Asmet & Mai) for the first, second, and third appllants in Civil Appeals No J–02–485 of 1998 and J–02–627 of 1998.

Wong Kim Fatt (Wong Boon Lee and Suraya Hani bte Abdul Halim with him) (Gulam & Wong) for the fourth and fifth appellants in Civil Appeal No J –02–485 of 1998.

KS Dass (K Sila Dass & Partners) for the sixth appellant in Civil Appeal No J–02–485 of 1998.

SC Yap (Arthur Lee & Co) for the first, second, third and fourth respondents in Civil Appeals No J–02–485 of 1998 and J–02–627 of 1998.

Alvin John (KC Lu and Yvonne Teo with him) (Shahrizat, Rashid & Lee) for the fifth respondent in Civil Appeals No J–02–485 of 1998 and J–02–627 of 1998.

Arifin Jaka JCA (delivering judgement of the Court):

[1] There are two appeals in these proceedings, namely Rayuan Sivil No J–02–485 of 1998 and Rayuan Sivil No J–02–627 of 1998. The appeal of the six appellants in Civil Appeal No J–02–485 of 1998 ('Appeal 485') was by the consent of all the parties heard together with the appeal of the three appellants in Civil Appeal No J–02–627 of 1998 ('Appeal 627') as they related to the same immovable property of the estate of the late Mr Gan Cheng Leong ('the deceased'). In Appeal 485, the first three appellants are the administrators as well as beneficiaries of the estate of the deceased, and the other three appellants are the interveners. The five respondents in Appeal 485 are also the five respondents in Appeal 627, and they are among the 16 beneficiaries (ie the 15 children and their mother the first appellant) of the estate of the deceased. After hearing learned counsel for all the parties, the court unanimously allowed both the appeals with costs. We now give our reasons for doing so.

BACKGROUND FACTS

[2] These appeals have a long and chequered history. In order to understand them properly, it is necessary to narrate their background facts briefly. The deceased died intestate over three decades ago on 26 November 1972. He married the first appellant Madam Khoo Cheng and they had 15 children. The deceased was survived by the first appellant and their 15 children. Two of their children had since died and are represented by their legal personal representatives. Letters of administration of the estate of the deceased were granted to the first appellant and their sons Mr Gan Hong Chuan (second appellant) and Mr Gan Hong Chai (third appellant). We will refer to them jointly as the administrators. The deceased had left behind valuable immovable property, viz the 40 lots of land forming the subject matter of the appeals. All these lots of land are situate in the district of Muar, state of Johor. They have remained unsold or undistributed until today. Over the decades, their values have appreciated substantially.

[3] On 1 December 1992, the five respondents in these two appeals made an application by originating summons No 852 of 1992 ('OS 852') in the Johor Bahru High Court where they are the plaintiffs, seeking an order for the distribution of the property of the estate of the deceased. In this OS 852, the five respondents cited eleven defendants, ie their mother (the first appellant) and the other siblings. No distribution order has been made by the court to date on OS 852.

[4] In the meantime, the administrators through their previous solicitors made an application by summons-in-chambers dated 30 August 1995 (encl 26) ('the administrators' application') in OS 852 for an order of sale of the 40 lots of land of the deceased's estate at the stated reserved prices based on the valuation reports of their valuers Ms Henry Butchers. The administrators' application for the permission of court to sell the immovable property of the estate was made under s 60(4) of the Probate and Administration Act 1959 and it was adjourned many times over several years until it was finally heard by the learned judge on 16 June 1998 when he made his order ('the order of 16 June 1998') appealed against in Appeal 485.

[5] The fourth, fifth and sixth appellants in Appeal 485 are three of the eleven defendants in OS 852 which, as stated earlier, was instituted by the five respondents herein for an order of distribution. As for service of the relevant applications, it is not in dispute that the fourth to sixth appellants were not served with OS 852 as well as the administrators' application for an order of sale of the 40 lots of land belonging to the estate of the deceased. Being wholly dissatisfied with the order of 16 June 1998 of the learned judge, the fourth to sixth appellants shortly thereafter made applications in High Court before the learned judge to set aside and to stay his said order until disposal of their applications. Unfortunately, these applications to set aside and for stay were not heard in good time by the learned judge by the time the administrators' appeals in Appeal 485 and Appeal 627 were fixed for hearing before the Court of Appeal on 31 July 2002. As the fourth to sixth appellants were not parties in Appeal 485 in the Court of Appeal, they had applied promptly to that court for leave to intervene in this appeal. On that day, on the intervention applications of the fourth to sixth appellants in Appeal 485, the Court of Appeal of a different panel consisting of our learned brothers Dato' Abdul Hamid, Datuk Wira Mohd Noor and Dato' PS Gill JJCA (as they then were) unanimously allowed the intervention applications and ordered the three intervenes to be added as parties as the fourth to sixth appellants in Appeal 485 and to file their memorandum of appeal, which they did.

[6] The two appeals were then adjourned and subsequently fixed for hearing before this court on 24 February 2004. During the hearing of the appeals, a total of ten counsel appeared before the court representing the various interested parties. In Appeal 627, the learned judge in the High Court, after making his order of 16 June 1998 but before it was perfected, had refused on 18 August 1998 the oral application of former counsel for the administrators to amend some typing errors. Appeal 627 is therefore against the refusal of the learned judge to allow the amendment sought and we will deal with this matter later on in this judgement. We had the advantage of reading the written submissions and bundles of authorities of learned counsel for all the parties. The written submissions of Dr Wong Kim Fatt on behalf of the fourth and fifth appellants had raised the several issues relevant to our consideration and determination of these appeals.

THE NATURAL JUSTICE ISSUE

[7] As stated earlier, the respondents' OS 852 for distribution and the administrators' application for an order of sale had not been served on the fourth to sixth appellants, and no notice was given to the latter regarding the hearing on 16 June 1998, when the learned judge made his order of 16 June 1998 complained of. The fourth to sixth appellants had a direct interest in OS 852 and the administrators' application and were entitled to be heard. The learned judge had not properly directed himself on the non-service of the relevant documents on the fourth to sixth appellants. He merely assumed that OS 852 for distribution had been served on all the defendants when it had not. He said in his judgement: 'Before I made the aforesaid order of the 16 June 1998, I have the occasion to seek the view of all the five said plaintiffs and also the second to third defendants; the rest of the beneficiaries did not even file their respective appearances.' How were the rest of the beneficiaries to enter their appearances when they were not served with OS 852? In our opinion, the respondents' failure to serve OS 852 for an order of distribution and the administrators' failure to serve their application for order of sale and notice of hearing fixed on 16 June 1998 on the fourth to sixth appellants constituted a clear violation of the rules of natural justice. On this ground alone, the fourth to sixth appellants are entitled to have the impugned order of 16 June 1998 set aside *ex debito justitiae*. On this natural justice issue, we need only refer to a few leading authorities without citing any passages: *Muniandy a/l Thamba Kaundan & Anor v D & C Bank & Anor* [1996] 1 MLJ 374; *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134, *White v Winston* [1965] 2 QB 647 and *R v Appeal Committee of County of London Quarter Sessions* [1956] 1 All ER 670.

COURT ORDER FOR SALE

[8] Section 60(4) of the Probate and Administration Act 1959 expressly provides that an administrator may not without the previous permission of the High Court: '(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situate in any State and for the time being vested in him.' These provisions are intended to prevent any improper sale of or dealing in the immovable property of the estate of a deceased by an administrator, who is required by law to apply to the High Court for an order of sale, supported by affidavit exhibiting a reliable valuation report on the property concerned for the consideration of the judge.

THE BEST PRICE AND INTEREST OF ALL BENEFICIARIES

[9] In these appeals, the administrators had annexed their valuation reports of Ms Henry Butcher of 24 December 1994 on the then current market values to their affidavit on the 40 lots of land in questions. The five respondents had challenged the administrators' market values as being too low and, through

the affidavit of Madam Gan Hong Yock (first respondent), the respondents filed their own valuation reports of Ms JS Valuers of 3 January 1996 on the then current market values showing very much higher values over each property valued on behalf of the administrators, from item 1 to item 40.

[10] We need only refer to two items to show the vast differences in value tabled in the affidavit of the first respondent dated 21 January 1996 at AR 203 — AR 211 in Appeal 485. For example: (a) for item 36 on the three storey shophouse on Lot TLO 2083, Muar, the administrators' valuation at AR 488 is RM400,000, while the respondents' valuation at AR 673 is twice that value at RM850,000 when the judge sold it to the first respondent at an incredibly low price of RM52,560; and (b) for item 26 on Lot 2697, the administrators' valuation is RM77,440 at AR 490, while the respondents' valuation is nearly ten times higher at RM765,000 at AR 591, when the judge sold it to the second respondent for a mere RM70,000!

[11] With respect, the learned judge, assuming he had a proper application for sale before him, should have applied the best price rule and sold the 13 lots of land at the best prices available. We are of the opinion that the ultimate object of the best price rule in the circumstances of the case is the protection of the interest of all the beneficiaries of the estate as a whole, not merely the interests of some of the beneficiaries. The learned judge had allowed the respondents to withdraw their valuation reports and expunged them from the record, without giving any valid reason. The respondents, after withdrawing their valuation reports, then accepted the administrators' valuation reports. In the circumstances, the learned judge should have acted on the valuation reports of the administrators, and the Lot 2083 should therefore be sold at the minimum price of RM400,000, instead of RM52,560. He had erred in law by selling it at a wholly unjustifiable price many times lower than that minimum price.

[12] The complaint of the fourth to sixth appellants is that the learned judge did not observe the best price available and that he had favoured the five respondents and sold the 13 selected lots of land to them at prices incredibly lower than their own valuations or those of the administrators. With respect, this complaint is well founded and supported by a long line of authorities. In *Che Ah and Che Yang Kelsom v Che Ahmad* [1941] MLJ 126 Terrell JA said at p 128 in the former Court of Appeal in 1941 that the first duty of the court is 'to protect the interests of the estate.' That court did not approve the lower price and ordered the sale at the higher reserved price. In *Buttle v Sounders* [1950] 2 All ER 193, Wynn-Parry J, in holding at p 195 that the trustees 'have an overriding duty to obtain the best price which they can for their beneficiaries,' gave them liberty to sell to a serious purchaser at the highest price. In the case of *Re the Estate of Tunku Mohamed Jewa Ibni Almarhum Sultan Abdul Hamid, Deceased Tunku Ismail Bin Tunku Mohamed Jewa & Anor v Tunku Baharom bin Tunku Mohamed Jewa & Ors* [1982] 2 MLJ 44, Syed Agil Barakbah J (as he then was), said at p 46: 'I feel it is my duty to protect the rights of all the beneficiaries in

the land to be sold'. And in the New Zealand case cited on behalf of the respondents, *Re Dawson (Deceased)* [1959] NZLR 1360, Adams J, in dealing with s 64 of the New Zealand Trustee Act 1956, which has resemblance to s 59 of the Malaysian Trustee Act 1949, said '... the court must take into consideration the interests of all the beneficiaries.' We agree with the principles stated in the cases above. It may be noted that in *Ng Lit Cheng v Felixia Varnakulasinghe & Anor* [1977] 2 MLJ 249, our former Federal Court restored the order of sale of the property which was sold at a price higher than it was valued by a first class appraiser five days earlier.

JUDGE MADE ORDER NOT APPLIED FOR

[13] Learned counsel for the fourth to sixth appellants complained that in the administrators' application by summons in chambers, the administrators had applied to court for only an order of sale of the 40 lots of land at the stated reserved prices. The administrators had not applied for any lot of land to be sold to the five respondents or anyone. We are of the view that the learned judge was not at liberty to go beyond the scope of the administrators' application before him for his decision. Learned counsel for all the appellants further complained that what the learned judge did was in effect to sell the 13 selected lots of land to the five respondents with preferential treatment. With respect, the learned judge erred in law in making the order of sale of 16 June 1998, which must be set aside. He should have given due regard to the interests of all the beneficiaries, not just a faction of them. If a property is sold below the reserved price based on a proper valuation report, each beneficiary will receive less money on distribution by the administrators, especially the mother whose share is one-third under s 6(1)(e) of the Distribution Act 1958. Once the order of sale is made under s 60(4) of the Probate and Administration Act, it is the duty of the administrators to sell the estate property at a price not lower than the reserved price. The administrators should act in the best interest of the estate and sell it at the highest price that is available.

APPEAL 627 — REFUSAL ON AMENDMENT

[14] We now address Appeal 627. This is an appeal by the administrators against the refusal on 18 August 1998 of the learned judge to amend certain items in the administrators' application. The former counsel for the administrators had urged the learned judge for the relevant reserved prices to be amended in the summons in chambers as there were some eight obvious typing errors for the reserved prices which were based on the valuation reports of the administrators. We need to illustrate only two instances of error: (1) for lot 1786 (item 33 of the summons-in-chambers) the reserved price of RM400,000 should read RM300,000 (AR 123); and (2) for Lot 2083 the reserved price of RM52,560 should read RM400,000. Learned counsel for the respondents objected to the amendment and the learned judge had refused it.

[15] The court's duty is to ensure fairness of dealings among the administrators and all the beneficiaries of the estate. During the hearing of the appeal, we asked counsel for the respondents if they were seriously opposing the appeal. However, they answered in the positive. We then asked them for the real reason why they opposed the amendment which would reflect the proper prices in the administrators' valuation reports which they had accepted. Mr SC Yap was frank enough with the court, and rightly so, in stating that he objected to the amendment solely because it was made orally and not in writing, although earlier he had been notified in a letter to him on the proposed amendment. We are of the view that the objection of the respondents is without any merit and that the learned judge should have allowed the amendment to reflect the proper reserved prices based on the evidence of the administrators' valuation reports which were before him.

APPEALS ALLOWED

[16] At the end of the hearing, the court made the following orders. The court allowed both the appeals and set aside the order of 16 June 1998 of the learned judge, with costs. Normally, costs will follow the event and the unsuccessful party must pay the taxed costs of the successful party. In these appeals, counsel for the respondents requested us that the costs be paid by the estate of the deceased, and counsel for the administrators not objecting, in the exercise of our discretion, we ordered that the costs of the appellants be paid by the estate. The respondents, being unsuccessful, must bear their own costs. The court further ordered that in Appeal 485 the administrators' application by summons in chambers dated 30 August 1995 (encl 26) for an order of sale be reinstated and be fixed for mention before the High Court (1) in Johor Bahru on 9 March 2004 at 9am. The administrators are at liberty to apply to amend their said summons in chambers.

Appeals allowed.

Reported by Loo Lai Mee